

## **Groundwater Adjudication Reform**

### *Summary of SB 226 and AB 1390*

#### Background

This year, the Legislature enacted reforms to the groundwater adjudication process. The legislation has three main objectives: (1) make the adjudication process more cost-effective; (2) ensure that the process is fair and comprehensive; and (3) harmonize the process with the Sustainable Groundwater Management Act (SGMA) to provide parties a forum to determine their water rights but also to prevent them from using it to obstruct or delay SGMA.

The legislation is divided into two bills, [SB 226 \(Pavley\)](#) and [AB 1390 \(Alejo\)](#), which are designed to work together. AB 1390 codifies the rules for basin-wide groundwater adjudications. SB 226 has additional rules that apply to adjudications in basins that must develop management plans under SGMA. AB 1390 amends the Code of Civil Procedure. AB 226 adds a chapter to SGMA in the Water Code. This is a brief summary of the bills. Unless otherwise indicated, all references to the Code of Civil Procedure relate to provisions in AB 1390, and all references to the Water Code relate to SB 226.

#### Type of actions covered

To ensure a comprehensive process, the legislation applies to all basin-wide groundwater adjudications. These comprehensive adjudications may include federal agencies and tribes, and may include rights to interconnected surface water when it is necessary for a fair and effective adjudication of the rights to the basin, as some past adjudications have done. The court may exclude small pumpers up to five acre-feet-per-year, which could make the adjudication more manageable without compromising its effectiveness. (Code of Civ. P., §§ 830 and 833)

The court has discretion to use the process if existing adjudications are expanded into areas currently governed by SGMA. The comprehensive adjudication process does not apply to small disputes, such as well interference actions. (Code of Civ. P., § 833)

To provide future certainty for all water right holders, the court may—but is not required to—determine the priority of unexercised water rights, consistent with the principles articulated in *In re Waters of Long Valley Creek System*. (Code of Civ. P., § 830)

### Basin boundaries

To limit disputes over basin boundaries, the legislation uses the same boundaries—and the same process for adjusting boundaries—as SGMA. The boundaries are identified by the Department of Water Resources (DWR) in Bulletin 118 and adjusted by DWR when justified, which may occur in response to a request by a party directed by the court to submit the request. The court may review DWR's decision via a traditional petition for writ of mandamus, which would be coordinated with the adjudication. (Code of Civ. P., § 841)

### Selection of Judge

Local judges are disqualified. The Judicial Council will select a neutral judge for all purposes. Judges may be challenged for cause only; there are no preemptory challenges. (Code of Civ. P., § 838.)

### Notice and service of complaint

Notice and service may be through various forms, including personal service, publications, websites, and mail. Notice must be provided to a wide range of interests, including landowners, groundwater sustainability agencies, cities, counties, relevant special districts, tribes, and specified state and federal entities. (Code of Civ. P., §§ 835 and 836.)

All known pumpers must be served according to procedures in the Code of Civil Procedure. In general, service of landowners may be accomplished by providing notice through the mail with return-receipt; some landowners may also form classes and would receive notice accordingly. Prior to sending notice to landowners, the plaintiff must file a draft notice to the court for approval. The court may require the notice to be translated. If they receive notice, people who claim to hold water rights have a legal duty to step forward and prove their claims. (Code of Civ. P., §§ 835 and 836.)

### Intervention

Some parties have a right to intervene in an adjudication action: the State of California, groundwater sustainability agencies, cities, counties, and landowners. (Code of Civ. P., §§ 837 and 837.5 [SB 226].)

### Discovery

To simplify and expedite discovery, parties are required to disclose their claims, pumping information, and other specified information early in the process, and they are required to update the information when it changes. (Code of Civ. P., § 842.)

### Case management

To manage the case efficiently and help prompt settlement, the court may divide the case into phases, adopt measures to prevent parties from re-litigating issues from a previous phase, limit discovery to corresponding phases, schedule early resolution of issues such as prescriptive rights, and allow the parties to form classes (groups) of persons with similar overlying rights to the groundwater in the basin. (Code of Civ. P., § 840.)

### Stay

To avoid interference and redundancy with the SGMA process, and to encourage settlement, the court has discretion to stay the litigation while the parties in the SGMA process develop technical information and management options. The stay may be renewed annually, contingent upon the parties' progress reports. (Code of Civ. P., § 848.)

### Special master

To help the court sort through complex technical and legal issues, the court may appoint a special master. The parties would pay the special master's costs, but the court has discretion to waive this requirement for parties that show good cause. (Code of Civ. P., § 845.)

### Preliminary injunction

One of the primary reasons that adjudications can take decades to resolve is that it is often cheaper for a party to drag out the litigation rather than resolve the case. Meanwhile, the parties continue to overdraft the basin, causing injury to water right holders and long-term damage to the basin. Also, some parties may hope to delay pumping restrictions by disrupting the SGMA process with strategic lawsuits or other tactics.

To discourage delay, minimize ongoing damage, and encourage settlement, if the basin is in overdraft, the court may issue a preliminary injunction to limit pumping during the litigation. In rare circumstances, if the SGMA process has been delayed or completely broken down, the court would be required to issue a preliminary injunction. (Code of Civ. P., § 847.)

### Witness testimony

To make the process more efficient, expert witness discovery is similar to the federal rules of civil procedure, including requiring written expert witness reports. (Code of Civ. P., § 843) To expedite trial, the court may require witnesses at trial to submit their testimony in writing. (Code of Civ. P., § 844.)

### Stipulated judgments

Historically, adjudications have nearly always ended with a negotiated settlement. But settlements are rarely unanimous, and the process of negotiating a settlement for hundreds or thousands of parties can take years and cost millions of dollars in attorney fees.

To provide an expedited process for negotiated settlements, while also allowing parties to fully litigate their issues, the court may enter a stipulated judgment that is supported by a majority (at least 50% of the parties who extract/store groundwater, and the parties responsible for 75% of groundwater production) and meets specified requirements. These include consistency with Article X, section 2, of the Constitution; consistency with the water right priorities of non-stipulating parties and small pumpers who are not present in the lawsuit; and equitable treatment of those non-stipulating parties and small pumpers. Objecting parties may continue to litigate, but the court may impose the plan on them if they fail to demonstrate that it violates their water rights or treats them unfairly. Objecting parties would not be subject to the stipulated judgment during the period necessary for the court to hear their objections, but the court retains authority to limit their pumping through a preliminary injunction. (Code of Civ. P., §§ 847, 850.) After a judgment is entered, the court has continuing jurisdiction to correct problems. (Code of Civ. P., § 852.)

### Judgments in basins where SGMA applies

SGMA applies regardless of whether an adjudication is filed. To prevent litigants from using the adjudication process simply to obstruct SGMA, if the adjudication occurs in a basin required to have a groundwater sustainability plan under SGMA, the court must find that a proposed judgment would not bar an agency from meeting its SGMA obligations. (Wat. Code, § 10737.8.)

Adjudications will be more efficient in the future if they leverage the SGMA process, in which the parties will be developing the same sort of management plans that historically have been developed in adjudications. The legislation gives parties incentives to align the outcome of an adjudication with SGMA. The parties may choose to submit a judgment, or a proposed stipulated judgment, to DWR to determine if it meets the existing requirements for an alternative plan under SGMA. If DWR determines that the alternative meets the objectives of SGMA, DWR would conduct its regular five-year assessments, as SGMA requires, and report the results and any recommended changes to the court, which will determine whether changes to the judgment are necessary. (Wat. Code, §§ 10737.4 and 10737.6.)

In short, the parties have two options for stipulated judgments. They can negotiate their own stipulation so long as it does not interfere with SGMA. Or they can negotiate a stipulation that also serves as a SGMA plan. In either case, the stipulating parties can obtain the certainty of a negotiated settlement without being held hostage by a small group of dissenters. Dissenters,

however, must have a forum to fully resolve their legal claims. Accordingly, they may continue to litigate rather than accept the stipulation.

### Consistency with SGMA

The legislation does not force adjudications to comply with the substantive terms of SGMA. Rather, it entrusts judges with the task of managing the process to avoid conflicts and redundancies. (Wat. Code, § 10737.2.) As noted, the court may stay an action, one year at a time, to allow the timely development of a SGMA plan (Code of Civ. P., § 848), and groundwater sustainability agencies and the state have a right to intervene in an adjudication process. (Code of Civ. P., §§ 837 and 837.5 [SB 226].) Parties in overdrafted basins may face a preliminary injunction to limit pumping, particularly if the SGMA process is delayed. (Code of Civ. P., § 847.) The court has flexibility to adopt a physical solution, by stipulated judgment or otherwise, after first considering any existing SGMA plan. (Code of Civ. P., § 849.)

If the parties choose to use the judgment in a comprehensive adjudication as a SGMA alternative, they must continue to meet all SGMA requirements, and the court would periodically determine, based on the recommendations of DWR, what revisions to the judgment may be necessary to continue to satisfy the objectives of SGMA thereafter (see discussion above). (Wat. Code, § 10737.6.)

Finally, if there are separate lawsuits relating to SGMA, the lawsuits may be coordinated or consolidated with a pending adjudication to prevent conflicts. (Code of Civ. P., § 838.)